INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 226

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

CENTRAL-ILLINOIS SECURITIES CORPORATION, C. A. JOHNSON, LUCILLE WHITE, AND FRANCES BOEHM

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari issue to review a final order of the United States Circuit Court of Appeals for the Third Circuit vacating a decree of the United States District Court for the District of Delaware with directions to enter an order disapproving in part a plan under Section 11(e) of the Public Utility Holding Company Act and to remand to the Commission which had approved the plan.

OPINIONS BELOW

The opinion and judgment of the court below (R. 12), and the opinion denying petitions and cross-petitions for rehearing (R. 138) have not yet been reported. The opinion of the district court is reported at 71 F. Supp. 797 (R. 283a). The findings and opinions of the Commission dated December 4, 1946, and January 8, 1947, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release Numbers 7041 (R. 25a) and 7119 (R. 128a).

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on March 19, 1948. Petitions and cross-petitions for rehearing were denied on June 11, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 803 (15 U.S.C. 79 *et seq.*).

STATUTE INVOLVED

Section 11(e) of the Public Utility Holding Company Act of 1935 provides as follows:

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the

Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (*f*) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 24(a) of the same Act provides as follows:

"SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is

material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347."

QUESTIONS PRESENTED

The holding company which is being liquidated in compliance with Section 11 is solvent. Under its charter, the three classes of preferred stock have call or redemption prices higher than their liquidation preferences. Each of the three classes of preferred shares has an investment value at least equal to the call price. The following questions are presented:

1. Did the Commission properly apply the "fair and equitable" standards of Section 11(e) of the Public Utility Holding Company Act as interpreted in *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, in approving a plan which would pay to the preferred stockholders cash equal to the current going concern value of their shares but not in excess of the call price, where this amount exceeds the inventory liquidation preference of such shares?

2. Where preferred stockholders are accorded the going concern value of their rights surrendered in the liquidation of a holding company pursuant to Section 11 of the Holding Company Act, is the Commission required to reconstitute the history of the company so as to determine whether there have been any losses as a result of divestments or other action taken by the common stock management by reason of the Act, with a view to shifting those losses in whole or in part to preferred stockholders?

3. Where a plan satisfies a preferred stockholder's senior claim in cash and the Commission (a) equates the cash received to the value of the interest surrendered by the preferred, and (b) finds that the residual common stock interest is benefited through the retirement of the preferred, is the Commission required to put a cash value on what the common stockholders should receive and surrender?

4. Where a plan under Section 11(e) of the Public Utility Holding Company Act is enforced

in a district court and there is no dispute as to the sufficiency of the evidence upon which the Commission based its finding of fairness, is the court authorized to reject such finding on the basis of a discretionary weighing of equities without reference to the limitations upon the scope of judicial review which this Court has held apply to a Circuit Court of Appeals in direct review of a plan under Section 24(a) of the Act?

STATEMENT

This case involves a plan filed under Section 11(e) of the Public Utility Holding Company Act of 1935 by Engineers Public Service Company ("Engineers"). The plan contemplated *inter alia* satisfying the claims of Engineers' preferred stockholders in cash as a preliminary to distributing its remaining assets to common stockholders and dissolving. The only substantial controversy before the Commission, and the question upon which the Commission and both courts below have differed, was the application of the "fair and equitable" standard of Section 11(e) to the division of the assets of the company between the preferred and common stockholders. The other aspects of the plan raised no important dispute and have been consummated, reserving the present issue through an "escrow" arrangement which set aside the funds in dispute.[1]

[1] This Court has previously been advised of the partial consummation of the plan as mooting the cases then pending upon cross petitions of the Commission and of Engineers to review the decision of the United States Court of Appeals

Engineers had outstanding three series of cumulative preferred stock of equal rank: 143,451 shares of $5 series, 183,406 shares of $5.50 series, and 65,098 of $6 series. The plan as originally filed by the company proposed to pay all preferred stockholders only the amount of their involuntary liquidation preference, which was $100 a share and accrued dividends for each series of preferred stock. The plan had been formulated by management which was controlled by the common stockholders, and was supported in the administrative proceedings by company counsel. In order to assure an adequate presentation of the preferred stockholders' point of view, the Board of Directors authorized a member primarily interested in the preferred stock (Streeter) to employ counsel partially at the company's expense. There also appeared before the Commission representatives of a group of institutions which held preferred stock (Home Insurance Company, et al). The preferred stockholders' representatives appeared in opposition to the plan and contended that they should receive $105 for the $5 series and $110 for the $5.50 and $6.00 series, amounts which were equal to the voluntary liquidation or redemption prices specified in the charter.

Expert witnesses who testified on behalf of the preferred stockholders and the management

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for the District of Columbia, 138 F. 2d 936, which upheld in part determinations of the Commission under Section 11(b)(1). That decision was vacated as moot. 332 U. S. 788.

agreed, as Engineers stated in its brief before the Commission, that "the present value or investment worth of these three series of stock, on a going concern basis and apart from the Act, under prevailing yields applied to comparable securities", was in excess of the respective call prices (R. 67a, see also R. 193a). The estimates of value ranged from $106.25 to $111.11 for the $5.00 preferred, from $111.38 to $122.22 for the $5.50 preferred, and from $111.50 to $133.33 for the $6 preferred (R. 66a-67a).

The Commission agreed with Engineers that the proposed liquidation was "caused by the Act and is in that sense 'involuntary' " (R. 61a). This holding accords with a long line of Commission and court precedents under which bonds and preferred stocks have been retired in liquidations required by Section 11 without payment of the call price.[2] Disagreeing with Engineers, the Commis-

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[2] Cases involving bond retirement: *The United Light and Power Company*, 10 S.E.C. 1215 (1942), affirmed *sub nom. N. Y. Trust Company* v. *S.E.C.*, 131 F. 2d 274 (C.C.A. 2 certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *North American Light & Power Company*, 11 S.E.C. 820 (1942), affirmed *sub nom. City National Bank & Trust Company* v. *S.E.C.*, 134 F. 2d 65 (C.C.A. 7); *North Continent Utilities Corporation*, S.E.C. (1943), Holding Company Act Release No. 4686, plan approved and enforced, 54 F. Supp. 527 (D. Del.); *Standard Gas and Electric Company*, S.E.C. (1944), Holding Company Act Release No. 5430, plan disapproved, 59 F. Supp. 4 (D. Del.), reversed 151 F. 2d 326 (C.C.A. 3).

Cases involving preferred stock: *Lahti* v. *New England Power Association*, 160 F. 2d 845 (C.C.A. 1); *Buffalo, Niagara and Eastern Power Corp.*, S.E.C. (1945), Holding Company Act Release No. 6083; *Georgia Power & Light Co.*,

sion held that the liquidation, although "involuntary," did not require the preferred stockholders to accept the charter involuntary liquidation preference as the sole measure of their claims. In so holding the Commission relied on this Court's ruling in *Otis & Co. v. S. E. C.*, 323 U. S. 624 (R. 61a). Both courts below agreed that, under the *Otis* case, Engineers' charter provisions were not dispositive of the issues (R. 228, note 2, and R. 34). Having found neither the voluntary nor involuntary liquidation preference dispositive, the Commission determined in accordance with priority rights whether the plan accorded each security holder "from that which is available for the satisfaction of his claim, the equitable equivalent of the rights surrendered" (R. 62a). The Commission found that the preferred had an investment value at least equal to the respective call prices, but treated the call prices as setting "a ceiling." This sum the Commission found to be the equitable equivalent of the rights surrendered, and since the plan did not provide for payments in that amount the Commission disapproved it.

Engineers decided on advice of counsel (R. 1949a) to accept the Commission's findings and amended the plan to provide for the additional payments to the preferred. Two common stock-

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S.E.C. (1945), Holding Company Act Release No. 5568, plan approved and enforced, Civil Action No. 133 (M. D. Ga., 1945); *Cities Service Power & Light Co.*, S.E.C. (1944), Holding Company Act Release No. 4944.

holder groups (respondents herein) then appeared in opposition to the amended plan. However, the amended plan was approved by the Commission as fair and equitable to both the preferred and common stockholders.[3] Upon application for enforcement of the plan, the district court, in the exercise of what it considered to be its "affirmative and independent duty" (R. 286a), found that $100 per share was the fair and equitable equivalent of the preferred stockholders' claim and disapproved that portion of the plan calling for a payment of more than $100 per share. This conclusion was reached by the district court despite its acceptance of the Commission's finding that the "present value for these preferreds [is] substantially in excess of the charter liquidating preferences."[4] (R. 290a). The court entered an order approving and enforcing the plan except insofar as it contemplated payments of any amount in excess of $100 per share and accrued dividends to the preferred stockholders.

On appeal by the Commission and preferred stockholders, the Circuit Court of Appeals for the Third Circuit upheld the district court in its

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[3] —— S.E.C. —— (1947), Holding Company Act Release No. 7119 (R. 128a).

[4] Subsequent to its opinion the court adopted certain findings of fact, in the form presented by the common stockholders, which, while not repudiating the acceptance of the expert testimony as to present value, stressed the possibility that through future increase in interest rates, or decline in earnings, or both, the future value of the preferred stock, if allowed to remain outstanding, might well be substantially less than its present value (R. 310a-315a).

rejection of the Commission's determination that the amended plan was fair and equitable. The court criticized the valuation methods employed by the Commission, and held that even if there was not a "plain abuse of discretion" by the Commission, it was within the province of the district court to reject the Commission's determination. It held that the district court "cannot value the securities, find equitable equivalence therefor and substitute its own estimates for those of the Commission" (R. 39) but can merely veto the Commission's decision. The decree of the district court was accordingly vacated and the case was remanded to the Commission for a fresh determination of the amount which the preferred stockholders should receive.

All appellants filed petitions for rehearing, and in the Commission's case for clarification as well. All appellees filed cross-petitions for rehearing, which were denied in an opinion which declined further to discuss the problems raised by the petitions but which directed the Commission either to "proceed to a reconsideration of the problems presented in the light of our opinion or procure the review thereof by the Supreme Court." (R. 140).

REASONS FOR GRANTING THE WRIT

This case involves issues of substantial importance in the administration of the Public Utility Holding Company Act. Plans which contemplate discharging preferred stockholders'

claims in cash have been proposed to resolve Section 11 problems of a number of major holding companies, and whether the preferred stockholders shall receive the full value of the interest which the plan requires them to surrender, where this is claimed to exceed the involuntary liquidation preference, is an issue involved in at least 5 cases now pending before the Commission. Some $194,200,000 of total preferred stockholders' claims are involved in these cases, of which some $23,260,000 represents the disputed area in excess of the charter involuntary liquidation preference.[5] The problem arises out of the fact that many preferred stock charter provisions provide for an involuntary liquidation preference which is lower than the call or voluntary liquidation price (where the preferred stock is callable), and from the fact that many of such preferred stocks have a dividend rate which is high in relation to current money rates.

I

In determining the value of the rights surrendered by preferred stockholders, the Commission starts with the doctrine of strict priorities

[5] While the escrow device used in this case is available to limit the area of controversy, the confusion which the holding below engenders as to the determination of the total preferred stockholders' claims necessarily tends to complicate the entire processes of working out reorganization plans. Indeed, some of the implications of the holding below confuse the standards applicable even to plans which propose to satisfy preferred stockholders by an allocation of earnings assets rather than cash.

and with the principle that the "rights of stockholders of a solvent company which is ordered by the Commission to distribute its assets among its stockholders may be evaluated on the basis of a going business and not as though a liquidation were taking place." *Otis & Co.* v. *S.E.C.*, 323 U. S. 624, 633. The latter principle has been paraphrased by this Court as "that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors." *Ibid.* p. 638.

Here, as in *Otis*, the holding company is solvent. Upon analysis of the financial condition of the company and particularly the asset and earnings coverage of the preferred stocks, and comparison in the light of these factors with the market prices of other utility holding company preferred stocks, the Commission found from undisputed evidence that Engineers' preferred stocks had investment values at least equal to the respective call prices of $105, $110 and $110. These call prices were regarded as the "ceiling" upon the values to be accorded to the preferred stocks, since they could be retired at those prices (R. 61a-68a).

In determining that the "fair and equitable" standard of Section 11(e) required payment to the preferred stockholders of the call or redemption prices of their shares, the Commission be-

lieved this result was consistent with, if not compelled by, the decision of this Court in the *Otis* case. In *Otis*, the claim of the preferred stockholders if measured by the liquidation value would have been greater than its existing value as an interest in a going business; in that case, this Court approved valuation of the preferred stockholders' claim as part of a continuing enterprise and refused to apply the liquidating value. In the instant case, in contrast to *Otis*, the liquidating value of the preferred stocks is less than their investment value as interests in a going business (as limited by the call price). Here, the Commission construed the *Otis* case as meaning that the Holding Company Act should not be permitted to mature claims and thereby transform the existing value of a security in a going concern into a matured claim, i.e., a liquidation value, which might be greater or less than such existing value (R. 72a). Since the "existing" value of Engineers' preferred stocks, whether measured by investment value or by the redemption price at which the common stockholders can terminate the preferred stock interest in the business, exceeds the liquidating value, the Commission concluded that the rule of strict priorities requires that the preferred stockholders be paid an amount equal to their redemption prices in order to satisfy their prior claim to the assets and earnings of the company.

1. While the court below has agreed with the Commission that under the *Otis* case the liquida-

tion preference is not dispositive, it has rejected what the Commission regards as the only method of computing the equitable equivalent of the rights surrendered consistent with the doctrine of strict priorities reaffirmed as applicable to Section 11 reorganizations by the *Otis* case. The court below criticized the Commission for failure to ascertain the future earning power of the system and to apportion that earning power between the preferreds and common based on their respective claims to income, "as it did in the United Light & Power case" (R. 35). But that technique is appropriate only where, as under the United Light & Power plan, a new security is being allocated between preferred and common stockholders. The plan here involved—and both courts below held it to be appropriate—contemplates paying off the preferred in cash. Thus, as the court below recognized, the problem was simply to determine "just recompense [in cash] for the security which he [the preferred stockholder] would give up" (R. 38). To the Commission, this meant giving to the preferred stockholder in cash the current value of his stock as ascertained from undisputed evidence. Any valuation formula based upon apportionment of earning power which gave a lesser amount to the preferred stockholders would presumably violate the strict priorities rule as applied in the *Otis* case.

2. Similarly, the court below also criticized the Commission because it made no finding at all as

to the value of Engineers' common stock. Where, as here, the propriety of paying off the preferred stockholders in cash is unchallenged, and the common stockholders receive the residue of Engineers' assets, determination of the dollar value of the common stock would serve no purpose. If the price to be paid to the preferred stockholders for their shares is the price required by law, the common stockholders receive the full economic benefit of the retirement of the preferred and the residual assets—and that is all they are entitled to receive. Under such circumstances, this Court has held that the determination of dollar values is not required. *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448; *Group of Institutional Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 564-565.

3. The court below held that the Commission erred in valuing the preferred stock "*ex* the Public Utility Holding Company Act, i.e., as if the Act had never been passed", and not valuing the common stock "by a similar standard." The context indicates that the court below regarded the Commission's valuation of the preferred stock on a going concern basis, rather than at the amount of its liquidation preference, as valuing the preferred as if the act had not been passed. From this premise the court reasoned that consistency requires the Commission to value the common stock as if the act had not been passed, i.e., by reconstituting the entire history of the enterprise since 1935, determining, *inter alia*, what divest-

ments were attributable to the act and computing in retrospect what "losses" had occurred where the proceeds of the sales might be found less valuable by today's standards than the divested assets if retained. Thus, the Commission is required to add back such losses "to the credit side of the enterprise's balance sheet" (R. 37) and thus in some way shift all or part of the burden of such losses from the common to the preferred stockholders.[6] We submit that the Commission valued both preferred and common stockholders' interests by a "similar standard" in making sure in each case that the interest received by reason of the plan should have a value at least equal to the interest surrendered.[7] Nor was it inconsistent for the Commission to apply the fair and equitable standard to the plan before it, so as to prevent the plan itself from causing a shift in values from preferred to common stockholders (or vice versa) as those values would exist apart from the plan, without pushing the "ex the act" concept to the extent of attempting to decide how preferred and

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[6] The opinion below suggests as a possible escape from such a hypothetical reconstitution of Engineers' balance sheet that the Commission may do its valuation "intra the act" which we interpret as treating the preferred stockholders' liquidation preference as dispositive (R. 37). This, however, would in our opinion contravene the decision in the *Otis* case, and apparently the court below agrees (R. 34).

[7] Both of the courts below accepted the hypothesis of losses due to the Act despite the fact that marketwise the common stock increased in value from a low of 1⅛ in 1935 to 36 on February 13, 1946, the latest date covered in the hearings before the Commission (R. 62a-63a, n. 45).

common stockholders would have fared if the Act had never been passed.

It seems clear that any method of shifting to the preferred stockholders losses as determined by such a reconstruction of Engineers' balance sheet would violate the doctrine of strict priorities. It also makes the task of administering the Act one of constantly increasing difficulty whereby each new step in simplifying a holding company system requires a reappraisal of everything that has gone before. The respondent common stockholders have interpreted the opinion below as not requiring a definitive evaluation by the Commission of the precise amount of losses and offsetting gains attributable to the enactment of the Holding Company Act, but as requiring the weighing of such hypothetical losses with other equities in the case (R. 111). This interpretation is close to the concept of "colloquial equities" articulated by the district judge as supplanting in Section 11(e) reorganizations the fixed principle of strict priorities (R. 291a). The district court had stressed as colloquial equities which "looked towards 'non-payment of the premium" (a) that Engineers did not receive as much as $98 per share and the public did not pay initially more than $100 per share for the preferred; (b) the market history of the preferreds; (c) the assumed losses from past divestments; (d) that the present high value of the preferred reflects retained earnings which might have been paid out in dividends to common stock

if the management had not deemed it desirable to conserve cash *inter alia* in anticipation of retirement of the preferred as a step in compliance with Section 11 (R. 289a).[8] The court below restates this theory of the district judge without expressly accepting or rejecting it, and admonishes the Commission to weigh "all pertinent factors and substantial equities" (R. 38) in arriving at the equitable equivalent of the interests surrendered, and makes it clear that a mere financial appraisal of "the investment value" of the interests surrendered is not a sufficient measure of "equitable equivalents".[9] To the extent that the opinion be-

[8] The district judge's rejection of a fixed principle of fairness and equity in favor of an undefinable concept of colloquial equity was further elucidated in a subsequent case in which the same court happened to agree with the Commission's 71 F. Supp. 1003, 1004, 1005 (D. Del), in which the court below stated:

> * * * the test is not simply whether the senior security holders, in their order of preference, get the equitable equivalent of the rights surrendered as they would in a reorganization case where insolvency obtains, i.e., the test exemplified by Group of Institutional Investors et al. v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 318 U. S. 523, * * * but whether all classes of stockholders are getting fair and equitable treatment based on notions of colloquial equity.
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> * * * * * * *
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> * * * I wish to re-emphasize that once the charter provision [on liquidation] is regarded as not controlling, the relative rights of the various security holders are determined by the applications of standards of colloquial equity.

finding as to fairness. See In the matter of cities Service Co.

[9] The Commission, of course, recognizes the propriety of applying the sanction of subordination or limitation to cost. Cf *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, rehearing denied, 332 U. S. 783. Here, however, there was no suggestion of inequitable conduct on the part of the preferred stockholders who did not even have voting control.

low does rest upon the necessity for including such imponderables in the "fair and equitable" standard, it brings to the valuation process a scope of discretion that is without standards, for the innumerable hypotheticals which might be constructed with equal justification will place the Commission and perhaps the enforcement court in an almost wholly arbitrary realm.

II

The court below held that under Section 11(e) a district court must, like "an equity reorganization tribunal", exercise a full and independent judgment as to the fairness and equity of the plan, and, conversely, that such a court is not limited in its role as is a circuit court of appeals under Section 24 of the Act. Asserting that this was "a question of law which, we think, goes to the heart of the instant controversy", the court below recognized that its conception of the function of the district court was in conflict with decisions of the First and Eighth Circuits in *Lahti* v. *New England Power Ass'n*, 160 F. 2d 845, 858, and *Massachusetts Mutual Life Ins. Co.* v. *S.E.C.*, 151 F. 2d 424, 430, respectively. The court below rejected as not controlling, the principle enunciated by this Court in *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 207, in which a Commission order issued under Section 11(h) was reviewed under Section 24, that the review function is at an end "when it becomes evident that the Commission's action is based upon

substantial evidence and is consistent with the authority granted by Congress."

The court based its interpretation of the role of the district court under Section 11(e) upon the language of that sub-section read in the light of other reorganization statutes, and upon certain excerpts from the legislative history of the Act and statements by Commission officials. The Commission agrees with much of what the court below states concerning the intention of the Congress to have the Section 11(e) court function as an independent check upon the Commission's determination that a plan is fair and equitable and also that the respective roles of Commission and enforcement court should be in general similar to the relationship under Section 77 of the Bankruptcy Act between the Interstate Commerce Commission and the reorganization court. Thus, even in uncontested proceedings the Commission has consistently taken the position that the district court must be satisfied affirmatively that the plan is "fair and equitable." The Commission has also taken the position that the "opportunity for hearing" prescribed in connection with proceedings in the district court extends to persons who did not appear in the administrative proceeding.[10]

[10] The district court's supervision of the execution of the plan serves as a further safeguard, the significance of which may depend on the nature of the plan: Section 11(e) provides "that the court shall have jurisdiction to appoint a trustee", which could be the Commission, to "hold or adminis-

We believe, however, that the Court below has misapplied the analogy to Section 77 of the Bankruptcy Act and has erred in assuming that that analogy authorized the district court to reject the Commission's finding with respect to the instant plan on discretionary grounds which would not be open to a Circuit Court of Appeals upon direct review of a similar order under Section 24(a) of the Act.

The following anomalous consequences would flow if the construction by the court below should prevail: (a) while Section 24(a) and Section 11(e) are alternative ways of submitting to judicial scrutiny a plan theretofore approved by the Commission, the scope of review in the two proceedings would be radically different; (b) where after affirmance of the Commission's approval order by a Circuit Court of Appeals it becomes necessary to seek enforcement in a district court it may be urged that the enforcement court has discretion to reject the findings which the Circuit Court of Appeals has affirmed;[11] (c) the breadth of dis-

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ter, under the direction of the court and in accordance with the plan" the assets involved. Thus far Section 11(e) plans have not involved substantial discretion as to execution and have been administered by corporate officers under the direction of the court.

[11] We question whether even the court below would push its conception of the independent responsibility of the district court this far. Section 24(a) provides that upon the filing of a transcript the reviewing Circuit Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part," and that the judg-

cretion conferred on the district court, unless limited by exercise of equally broad revisory powers in the Circuit Courts of Appeals and in this Court, would preclude uniform administration of the statute and make the treatment of a nation-wide groups of security holders depend upon accidents of venue; (d) to the extent that the district judge is vested with a discretion to check the Commission but not to prescribe the standard which shall govern the Commission's disposition of the case there would be a possibility of deadlock resulting from conscientious disagreement.

The importance of the issue as to the scope of review and the practical difficulties raised by the decision below as to that issue, are interrelated with the question of whether there is any room at all in the application of the fair and equitable standard for the special or colloquial equities emphasized by the courts below. For these reasons and because of the conflict of decision between the Circuit Courts of Appeals, it is important that this Court determine the scope of the powers vested in the district court by Section 11(e).

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ment of the court "shall be final" subject to review upon certiorari. In the only instance where a district court has considered a plan theretofore affirmed by a Circuit Court of Appeals, the district judge deemed himself limited to inquiring into developments subsequent to the order which the Circuit Court of Appeals had affirmed. See *In re Columbia Oil & Gasoline Corp.*, Civ. Action No. 290 (D. Del. 1942, unreported).

CONCLUSION

For the reasons stated, this petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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AUGUST, 1948.

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